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Standard of Review for Prosecutorial Use of Race Evidence During Trial

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STANDARD OF REVIEW FOR PROSECUTORIAL USE OF RACE EVIDENCE DURING TRIAL

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This Note argues that unfettered use of cultural evidence by prosecutors creates the same problems as would the use of evidence of race to show propensity of the accused to act. Using Wisconsin v. Chu as a case study, the author demonstrates that cultural evidence, just as any other evidence to show propensity to act, must rest upon the proper evidentiary foundation and that prosecutors must be sharply constrained in their use of cultural evidence.

On January 4, 1998, a fire occurred in a drycleaners store owned by So Man Chu and his wife Sun Hee Chu. During an investigation of the fire, authorities discovered the Chu family was in financial straits and began to suspect the fire was intentionally set to make an insurance claim. Investigators arrested the proprietor's son, Dale Chu, and charged him with arson. During the trial, the prosecution made several references to Chu's Korean background in an attempt to establish he acted in accordance to a cultural stereotype of filial duty.[1] Chu was convicted of arson with intent to defraud an insurer. He appealed his conviction on several grounds, including the prosecutor's repeated references to Korean culture. The Wisconsin Court of Appeals upheld his conviction. Subsequent appeals to the Wisconsin Supreme Court and the United States Supreme Court were unsuccessful.

Wisconsin v. Chu[2] is a case illustrative of the problems a court invites when admitting cultural evidence offered by prosecutors in criminal trials. This Note will use *Chu* to analyze the merits of cultural evidence and whether it should be admissible in criminal trials when presented by prosecutors. Before proceeding further, a definition of cultural evidence is necessary to clearly demarcate the boundaries of this discussion. This Note defines cultural evidence as a stereotype offered as fact during trial. Regardless of whether such characterizations are actual reflections of a recognized cultural practice, this Note considers all types of prosecutorial references to racial stereotypes offered as cultural evidence. In most cases, since cultural evidence is based on gross generalizations, it cannot be empirically verified. When a court

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1. Wisconsin v. Chu, 643 N.W.2d 878 (Wis. Ct. App. 2002).

2. *Id.*

admits cultural evidence, a jury is encouraged to consider the stereotype during deliberations. Thus, in these situations, it is irrelevant whether the stereotype is true.

This Note will argue that prosecutorial presentation of racial or cultural characterizations as evidence is a violation of due process and its use amounts to a constitutional error that should be reviewed under the constitutional error test articulated in *Chapman v. California*.[3] Part I will distinguish how prosecutorial use of cultural evidence is different from defendant use. Part II will use *Chu* as a case study to examine how prosecutors may misuse cultural evidence. Part III will analyze why race characterization requires a heightened standard of review on appeal. Part IV will explore the rare circumstances where cultural evidence should be admissible when presented by the prosecution. Part V will conclude the Note with a summary of the major points in favor of reforming the judiciary's method of dealing with prosecutorial use of cultural evidence.

PART I—DIFFERENCES BETWEEN DEFENDANT USE AND PROSECUTORIAL USE OF CULTURAL EVIDENCE

The majority of cases and legal scholarship involving the use of cultural evidence deal with instances in which defendants show how their actions were committed in accordance with a recognized cultural practice to negate the criminal element of mens rea.[4] Used primarily by immigrants, arguments that the defendant acted in a way he understands society normally desires serve to disprove the specific intent necessary to convict an individual of a crime.[5] This

3. 386 U.S. 18, 22–24 (1967).

4. MODEL PENAL CODE § 2.02(1) (2001) ("Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.").

5. *See* Leti Volpp, *(Mis)identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV. WOMEN'S L.J. 57 (1994) (analyzing how cultural defenses affect Asian women and the role of cultural relativism in criminal trials). *See also* People v. Moua, No. 315972-0 (Cal. Super. Ct. Fresno County Feb. 7, 1985). Moua, a Hmong defendant, faced kidnapping and rape charges. Not only did the defendant admit planning and executing the attack, he confessed he was aware that the victim was struggling against his actions. The defendant used his cultural background as an explanation of his behavior. Under the Hmong custom of "marriage by capture", a man abducts a woman (whose interest is irrelevant) without her consent to signal that he wants to marry her. If the woman does not protest, she is considered unchaste; if the man gives up, he is seen as weak. After intercourse, their parents work out the marriage arrangements. During pre-trial negotiations, the defense presented the judge with a twenty-two page pamphlet about Hmong marriage rituals. The pamphlet con-

goes beyond a similar situation where a perpetrator commits a crime because he is ignorant of applicable laws. Instead, cultural defenses imply that the defendant acted appropriately in a particular situation. When employing a cultural defense, the defendant is admitting to have committed the act charged. Thus, the prosecution can always use cultural evidence against defendants as evidence of motive, plan, or pre-meditation.

Although there are several examples of criminal defendants presenting a cultural defense, there is a dearth of cases where prosecutors have used cultural evidence to implicate criminal conduct. This raises additional concerns not present when the defendant raises such issues. There are significant differences between prosecutorial use of cultural evidence and its use by the criminally accused. One major difference is the Fifth Amendment's requirement that the state provide due process before taking away an individual's liberty.[6] In a criminal trial the prosecution is constitutionally bound to provide a fair trial to the defendant. Although American jurisprudence historically has not been unequivocally clear on what a fair trial entails, the basic idea of an accused's right to a fair trial is one of the traditional harbingers of American law.

A defendant's offer of cultural evidence is only probative if the defendant can show that cultural norms dictated that he act in the supposedly unlawful manner.[7] By demonstrating that he acted appropriately given the set of circumstances that gave rise to his act in question, a defendant can negate the criminal intent necessary to be convicted. There are two ways to achieve this objective.

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tained only a superficial description of a few types of marriage practices and cited one reference to "marriage by capture". However, the prosecution did not rebut the claims made in the brochure and Moua pled guilty to one misdemeanor count of false imprisonment and sentenced him to 120 days in jail and a $1,000 fine.

6. U.S. CONST. amend. V.

7. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

If cultural evidence can be shown to apply to a criminal defendant, it becomes relevant because it helps fact finders know whether the defendant is more likely than not to have committed the charged crime. Otherwise, the introduction of racial stereotypes in a case that do not shed light on whether a defendant committed a crime only allows the introduction of possible juror bias into the jury's decision. Although there is a theoretical probability that a racial stereotype could change the chances that an accused perpetrated a crime, Federal Rule of Evidence 403 bars the introduction of such a stereotype: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

A. First Method

The first method is to demonstrate the validity of the cultural evidence presented. By doing so, the defendant would be offering circumstantial evidence that he acted within the customary protocol for a given set of circumstances. Since defendants who present cultural evidence are typically immigrants still guided by the customs of their homelands, defendant offerings of cultural evidence usually involve recognized cultural traits.[8] Testimony by anthropologists and admission of academic research as evidence are examples of ways the validity of cultural traits can be proven. There is little danger that defendants will corrupt trial proceedings with bald assertions that their acts were the result of following imaginary societal customs. When an individual is charged with a violent crime, explaining allegedly criminal conduct by only offering stereotypical generalizations is unlikely to be credible to jurors. Such excuses are similar to baseless, uncorroborated alibis in jurors' eyes. Without any support to show how a defendant's cultural background influenced his actions, explanations that criminal actions were done without criminal intent do not give any reason for jurors to exculpate defendants.

B. Second Method

If a defendant cannot show that he acted within the societal rules of another culture, he can alternatively attempt to show that he sincerely believed that he acted within a culture's beliefs. The success of this second type of use by defendants of cultural evidence is dependent on whether a mistaken belief that a cultural practice exists can criminalize intent.[9] Since a defendant's earnest

8. *See* Gina Piccalo, *Attorneys to Cite Similar Incident in Drowning Case Defense*, L.A. TIMES, Feb. 17, 2000, at B11. Fumkio Kimura was a Japanese immigrant who discovered her husband was committing adultery. As a result, she attempted to commit "oyaku-shinju," a Japanese custom of parent-suicide. She drowned her 4 year old son and baby daughter in the waters of Santa Monica, California before being rescued from her own attempt at drowning. Kimura was charged with two counts of first-degree murder but eventually pleaded no contest to voluntary manslaughter. She received a sentence of one year in jail with five years of probation.

9. This second method of negating mens rea with cultural evidence parallels "mistake of fact" defenses. A "mistake of fact" defense is based on the premise that a defendant's inaccurate understanding of the factual circumstances surrounding the alleged crime is sufficient to prevent the establishment of a material element to the offense.

belief that a cultural trait exists could absolve him of criminal intent, establishing that the defendant mistakenly believed the cultural trait exists could be probative.

The fact that cultural evidence presented by the defendant does not have to be an accurate depiction of a culture significantly differentiates it from prosecutorial uses of cultural evidence. Defendants do not have to prove their innocence, whereas prosecutors must establish beyond a reasonable doubt that the defendant is guilty as charged. Accordingly, courts must restrict prosecutorial cultural evidence to instances where admission of evidence regarding verifiable cultural traits is probative to establishing one of the material elements of the crime. Otherwise, courts jeopardize an individual's liberty on the basis of unconfirmed stereotypes. Although prosecutors have the greater burden in winning a criminal case, defendants bear greater risk. At a cursory glance, the asymmetrical criteria for allowing cultural evidence may seem unfair, but the judicial system is created with procedural safeguards for the accused to lessen the chance of a court convicting an innocent person, even if such safeguards allow a guilty party to go free.[10] Few jurists are unfamiliar with the phrase, "the law holds that it is better that ten guilty persons escape than that one innocent suffer."[11] Courts must understand how the role of cultural evidence in a trial changes depending on which party is offering it as evidence.

PART II—HOW PROSECUTORS CAN MISUSE CULTURAL EVIDENCE—*Wisconsin v. Chu*

At this point it is important to clarify the distinction between prosecutorial misconduct and the type of cultural evidence focused on in this essay. Misconduct occurs when a prosecutor merely emotionally appeals to juror prejudice.[12] This Note's definition of

10. *See* U.S. CONST. amend. IV (protection against illegal search and seizure); U.S. CONST. amend. V (protection against double jeopardy and self-incrimination); U.S. CONST. amend. VI (right to effective assistance of counsel).

11. 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

12. *See* Smith v. Farley, 873 F. Supp. 1199, 1213 (N.D. Ind. 1994) (holding that prosecutor's remarks in closing argument that black defendant had to play "Superfly" and shoot victim while he was lying on sidewalk and that black witness was "shucking and jiving on the stand," were improper, but that the remarks did not interfere with impartiality of jurors; comments were limited in scope and evidence of defendant's guilt was overwhelming); Rosenthal v. U.S., 45 F.2d 1000, 1003 (8th Cir. 1930) (in closing argument, prosecutor called

cultural evidence does not encompass instances of prosecutorial misconduct. The strength of cultural evidence comes from assertions of fact.[13] When prosecutors accuse individuals of acting in accordance with a cultural trait, the accusations are based on stereotypes dressed up as cultural facts. Hence, courts should be cautious of whether proposed cultural evidence shifts a jury's attention away from evidentiary analysis to emotion.[14] In contrast, emotional appeals are inflammatory statements made to arouse the biases of jurors. Examples of prosecutorial misconduct includes improper arguments offering a personal opinion regarding a witness's credibility or guilt, diverting the jury's attention from deciding a case on the evidence, and arguments made to inflame or appeal to prejudice. In a dissenting opinion in *United States v. Antonelli Fireworks Co.*, Judge Jerome N. Frank articulated why prosecutorial appeals to juror prejudice are disfavored.[15] He noted if a prosecutor is allowed to "inflame the jurors by . . . arousing their deepest prejudices, the jury may become in his hands a lethal weapon directed against the defendants who may be innocent. He should not be permitted to summon that thirteenth juror, prejudice."[16] Typically, when prosecutors make such appeals to juror prejudice, they do so during closing arguments.[17]

Although blatant appeals to juror prejudice are troublesome to the judicial process, they are easy to identify and can be handled

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the jury's attention to the fact that Jewish defendant rented large warehouse space apparently for nothing and stated "I never knew of a Jew before that would surrender a piece of a warehouse twelve or fourteen feet wide and forty feet long for nothing."). Prosecutorial attempts to inflame jurors' emotions are not solely focused on defendants' racial background but also include efforts to identify with the jurors. *See* Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (improper comments and inflammatory statements made by prosecuting attorney such as "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know" denied black defendant a fair trial on rape charges).

13. There is a wide spectrum of possible prosecutorial uses of race between outright inflammatory appeal to racial bias and reasoned use of racial characterization. *See* McFarland v. Smith, 611 F.2d 414 (2nd Cir. 1979) (during closing arguments prosecutor insinuated that the testimony of an officer was credible because officer was the same race as defendant).

14. *See* Schurman v. Leonardo, 768 F. Supp. 993 (S.D.N.Y. 1991) (holding that a suggestion of racial motivation for a crime is allowable if it has an evidentiary basis and does not refocus case emphasis from evidence to emotion).

15. 155 F.2d 631, 659 (1946). For a discussion of emotional appeals to juror prejudices, *see generally* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1998).

16. 155 F.2d at 659.

17. *See* Miller v. North Carolina, 583 F.2d 701, 707–08 (4th Cir. 1978) (in his summation, prosecutor suggested that a defense based on consent in the trial of three black men for first-degree rape of a white woman was inherently untenable because no white woman would ever consent to having sexual relations with blacks).

accordingly. This Note addresses cultural evidence of the type presented in a rational manner for acceptance by jurors' minds rather than their hearts. It is more akin to junk science than prosecutorial misconduct.

A. Wisconsin v. Dale H. Chu

Dale Chu was a 17 year old Korean son to parents who owned "So's Dry Cleaning" in Appleton, Wisconsin.[18] On January 4, 1998, a fire consumed the dry cleaning establishment, one of a few that his parents owned.[19] He was charged with arson and intent to defraud an insurer when investigators discovered evidence suggesting a fire in his parents' store was set intentionally to make a fraudulent insurance claim.[20] He was arrested under the belief that his father ordered him to set the fire. In the *Chu* case, the prosecutor presented testimonial evidence that as a Korean son, Dale Chu was bound to obey his father's wishes even if those wishes meant committing a crime.[21] The prosecutors framed the racial characterization with an opening statement that foreshadowed the prosecution's intention to present cultural evidence and a closing argument that reiterated the Korean filial stereotype.[22] The prosecution used Dale Chu's Korean background to establish a motive

18. Brief for Respondent at 2–3, Wisconsin v. Chu, 643 N.W.2d 878 (Wis. Ct. App. 2002) (No. 01-1934-CR).

19. *Wisconsin v. Chu*, 643 N.W.2d 878, 880 (Wis. Ct. App. 2002).

20. *Id.* at 881. Neighbors to the dry cleaning store stated they saw an Asian male leave the store approximately thirty minutes before when the fire was reported. There were no signs of forced entry to the building and a window was left open, presumably to allow air flow to sustain the fire. The Deputy Fire Chief for the City of Appleton testified as an expert that he believed the fire was intentionally set. An independent fire investigator for the state concurred with his opinion. Police investigators found that So Man Chu, Dale's father, was in significant financial straits in 1997. In addition, So Man Chu increased his insurance policy an additional $80,000 two days prior to the blaze. When So Man Chu filed an insurance claim for losses stemming from the fire, he claimed $499,030 in losses. However, the value of several of the items that he claimed were lost in the fire was overstated, while other items simply did not seem to have even existed.

21. *Id.* at 883.

22. In his opening statement, the prosecutor declared, "The evidence will show in fact as part of family setup, and more particularly, because of his Korean culture, [Dale Chu] was very devoted and loyal to his father." Record at 72–77, *Chu*, (No. 01-1934-CR. In his closing argument, the prosecutor announced, "Dale Chu was—as a part of his life experiences, as part of his test of loyalty—was faced with the biggest test of loyalty of his life, loyalty on behalf of his dad. . . . And he carries out that mission . . . to get out of that tremendous bond." Record at 75–152, 153.

for setting the fire.[23] According to the prosecutor, Dale Chu was particularly loyal and faithful to his father because of his family environment and Korean heritage.[24] The testimonial evidence in the case came from Joanne Weiss. She portrayed herself as a "surrogate mother"[25] to Dale Chu and owned a house where he lived during the summer of 1999.[26] She testified:

> I know that Dale would have to get something out of it, but his dad is the one that should be sitting in that chair. In my eyes, his dad is the one that is responsible. Dale was a 16-year old kid and in his culture and in Dale's beliefs, you just don't talk back to your parents, you don't—you do what your parents ask you to do.[27]

Upon conviction, Dale Chu appealed on several grounds including the prosecution's references to his racial background. In upholding his conviction, the Wisconsin Court of Appeals interpreted the 7th Circuit case of *Aliwoli v. Carter*[28] to allow states the use of race to suggest motive. The Court of Appeals further found the prosecutorial references to Dale's racial and cultural background allowable because they were not attempts to inflame juror prejudice. Since the prosecutorial statements regarding race and culture were based on cultural evidence, the Court of Appeals considered any such reference during arguments to be a preview or summation of trial evidence.[29]

B. Flaws in the Chu *Court's Reasoning*

There are two major flaws in the way the Court of Appeals of Wisconsin handled the state's use of cultural evidence. First, the prosecutor did not directly tie Dale Chu to fit within the racial stereotype of Korean sons being culturally compelled to follow their father's commands. Second, the court failed to scrutinize whether the cultural evidence should be admitted into evidence. The basis

23. *Chu*, 643 N.W.2d at 882.
24. *Id.* at 883.
25. Brief for Appellant at 9, Wisconsin v. Chu, 643 N.W.2d 878 (Wis. Ct. App. 2002) (No. 01-1934-CR).
26. *Chu*, 643 N.W.2d at 882.
27. *Id.* at 883.
28. 225 F.3d 826 (7th Cir. 2000).
29. *Chu*, 643 N.W.2d at 884.

for this failure was the court's inability to understand how cultural evidence affects the trial process. These two problems are indicative of the problems a court faces when deciding whether to admit prosecutorial cultural evidence.

The prosecution portrayed Dale Chu as a dutiful son bound by Korean custom to follow his father's wishes. In reality, Dale Chu was often very disobedient to his father and did not fit the mold of a traditional Korean son. They had a strained relationship for a sustained period of time. When Dale ran away from home when he was 15 years old, his father did not report his disappearance to the police.[30] His father did not even know that Dale, who was still a teenager at the time, had an illegitimate child until five months after the child had been born.[31] These are not the traits of a traditional, pious Korean son. Perhaps Dale did not fit with the Korean son stereotype because he was not an immigrant himself.[32] Dale was born and raised in America, a different environment from the societal norms of Korea.[33] Whatever the reasons may be, Dale did not neatly fit within the prosecutor's depiction of obedient Korean sons. The prosecutor did not directly show how cultural evidence was relevant to Dale Chu's circumstances. By not directly connecting Dale to the stereotype, the prosecutor misled the jury with unqualified opinions dressed as anthropological fact and established motive through the use of a racial stereotype.

The trial court allowed the prosecutor's offer of cultural evidence without inquiring into its validity. The prosecutor's opening and closing arguments included references to the state's use of cultural evidence during trial, but defense counsel did not object to their inclusion. As a result, no scrutiny was placed on the prosecutorial arguments until the appeal was filed. With regard to the actual presentation of cultural evidence, the trial court's acceptance of Joanne Weiss's testimony explaining the cultural nuances behind Korean family relationships was done in the absence of any qualification of

30. Brief for Appellant at 24, *Chu*, (No. 01-1934-CR).

31. *Id.*

32. *Id.*

33. *Id.* at 23, 24. In the post-conviction appeal, Dale Chu secured the services of Dr. Yueh-Ting Lee, an associate professor of psychology at Minnesota State University and an expert on ethnic stereotypes. He explained the prosecutorial view of Korean sons was based on outdated and inaccurate views of Asian Americans. Dr. Lee cited the findings of sociologist Betty Lee Sung to point out that although Chinese parents wanted their children to follow Chinese cultural norms, American born Chinese children grew up with American values and were relatively more disobedient and disloyal to their parents. He also pointed to a 1986 study by Strom, Daniels & Parks that shows Korean American parents tended to raise their children to be more independent and encourage them to voice their own opinions.

Joanne Weiss as an expert in Korean culture. If Weiss had based her testimony on personal observations of the Chu household, then she could have offered admissible testimony that So Man Chu was an overbearing father or that Dale may have possessed an unquestionably submissive nature with respect to his parents' wishes. Instead, by couching her testimony as a generalization of Korean culture, she made a statement that contains no probative value unless the fact finder assumes that most Koreans accurately fit within the stereotype. Additionally, since Weiss was not qualified as an expert on Korean culture, there is no basis for believing that her claims regarding Korean culture are credible. Aside from Weiss, the state did not offer the testimony of any experts on Korean culture.[34]

The reason why the trial court and appellate court did not consider the use of cultural evidence to be improper is that the courts confused cultural evidence with prosecutorial misconduct. Cultural evidence is not synonymous with prosecutorial misconduct stemming from use of racial stereotypes. For instance, it would not be misconduct for a prosecutor to offer cultural evidence in good faith for a recognized purpose. Sincere attempts by counsel to introduce what is presumed to be valid evidence cannot be considered an act of misconduct because there is no intent to inflame jurors' biases, subvert the legal process, or do anything but try a defendant. However, even though the offer of evidence may not be an act of misconduct, in most cases the cultural evidence will be highly prejudicial to a defendant and should not be admitted. Instead of examining the possible effects of the cultural evidence on the jury and the trial process, both courts focused on whether the prosecutor had tried to inflame jurors' biases.[35] The courts did not understand the prejudicial nature of cultural evidence and endorsed its good faith use.[36] Consequently, the courts looked to the intentions of the prosecutor and neglected to inspect the nature of the offered evidence itself.

The prosecutor and the courts in *Chu* mistakenly relied on the standards set in *Aliwoli* for determining whether the use of cultural

34. *Id.* at 33.

35. *See* Wisconsin v. Chu, 643 N.W.2d 878, 884 (Wis. Ct. App. 2002) ("Similarly, we do not view the prosecutor's statements as an attempt to arouse jury prejudice toward Koreans. Rather, the statements were an attempt to preview and summarize evidence demonstrating that Chu had a motive for committing the arson: his personal belief, based on his upbringing and culture, that he should remain loyal to his family."). *See also* Brief for Respondent at 21, 22, Chu, (No. 01-1934-CR) for the argument that the statement was not improper racial stereotyping because it was merely the prosecutor's explanation of why Chu committed the arson, not an attempt to arouse any jury prejudice against Koreans.

36. *Chu*, 643 N.W.2d at 884.

evidence against Dale should have been admitted. *Aliwoli* is a case dealing with prosecutorial misconduct and attempts to arouse juror prejudice. Jamaljah Aliwoli was convicted on three counts of attempting to murder three Chicago police officers in the first degree.[37] On appeal, Aliwoli contended that the state violated his due process rights by attempting to "establish that Aliwoli's membership in the black Muslim faith gave him a motive to shoot the three police officers."[38] In reviewing his appeal, the 7th Circuit determined that the state's references[39] to Aliwoli's religious beliefs as a black Muslim were appropriate because the prosecutor was trying to establish motive and not deliberately appeal to jurors' emotions.[40] The *Aliwoli* court tried to determine whether statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[41]

Aliwoli set a sound standard[42] for reviewing prosecutorial attempts at inflaming jurors' passions and biases, but that standard does not lend itself successfully when evaluating cultural evidence. Cultural evidence does not fit within the *Aliwoli* framework because

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37. Aliwoli v. Carter, 225 F.3d 826, 828 (7th Cir. 2000).

38. *Id.* at 830.

39. *Id.* at 831:

> For example, the State cross-examined two of Aliwoli's expert witnesses by asking whether Aliwoli's black Muslim faith encompassed an anti-authority stance. The prosecutor also asked whether black Muslims have a negative view of the police and inquired about a black Muslim newspaper during the late 1960's and early 1970's that referred to police officers as "pigs" and white people as "white devils." The prosecutor queried whether one expert was familiar with a 1984 article in American Psychologist Publication that suggested that many African-Americans consider white people as potential enemies. Finally, the prosecutor also asked one expert about a statement in her psychosocial history of Aliwoli where she wrote, "although a Muslim, he did not seem to be excessively hostile towards whites."

40. *Id.*:

> It is apparent from the context of the prosecutor's questions that the references to Aliwoli's membership in the black Muslim faith were only meant to show that Aliwoli had a motive for shooting the police officers. In other words, the questions were clearly intended to rebut Aliwoli's insanity defense. Because the questions about Aliwoli's beliefs as a black Muslim focused solely on his state of mind and potential motive for the shootings, they were not improper. Although the questions mentioned Aliwoli's race and religion, none of them can be reasonably viewed as attempting to arouse jury prejudice towards blacks or Muslims. In short, there is no evidence that these comments were intended to play upon the prejudices of the jury.

41. *Id.* at 829 (*quoting* Darden v. Wainwright, 477 U.S. 168, 181 (1986)).

42. *Id.* at 831. "As a general rule, a racial remark is improper if it is "intentionally injected into volatile proceedings where the prosecutor had targeted the defendant's ethnic origin for emphasis in an attempt to appeal to the jury's prejudices." (*citing* United States v. Hernandez, 865 F.2d 925, 928 (7th Cir. 1989)).

it does not necessarily involve misconduct or the intentional arousal of juror prejudice. The most pressing danger cultural evidence poses results from unemotional offers of evidence that appear to be factually based. Cultural evidence exists when stereotypes are presented as rational thoughts and objective theories. There are no emotional pleas or passionate appeals involved. Another distinction between *Aliwoli* and *Chu* that prevents their comparison is that the cultural evidence in *Aliwoli* was based on religious beliefs.[43] As this Note will discuss later in Part IV, cultural evidence based on religious beliefs is different from cultural evidence based on racial stereotypes and does not deprive individuals of due process.

PART III—WHY PROSECUTORIAL USE OF CULTURAL EVIDENCE REQUIRES HEIGHTENED REVIEW

In addition to the differences in the nature of cultural evidence and prosecutorial misconduct involving racial stereotypes discussed in Part I, there are differences in the way both methods of characterization affect the trial process. The use of cultural evidence should be avoided in most cases and requires the highest level of judicial scrutiny when offered for admission because it circumvents the 5th Amendment's guarantee of due process by having two major negative consequences on the trial process. First, it affects the accused by forcing defendants to confront evidence that they cannot effectively contest. Secondly, cultural evidence affects the trial process itself because it allows jurors to exercise their biases against defendants of different backgrounds. In addition, prosecutorial cultural evidence warrants special attention from courts because it does not fall neatly within the current system of evidentiary rules. The following sections will lay out the effects of prosecutorial cultural evidence on defendants and jurors and investigate the effectiveness of current evidentiary schemes that could be used to determine when such evidence should be admitted.

43. *Id.* at 830–831.

A. Effect on Criminally Accused

The use of cultural evidence against criminal defendants denies them a fair trial under the Fifth Amendment because racial stereotypes cannot be directly refuted and attempts to do so may compel a defendant to waive his right to self-incrimination.[44] When a court accepts testimony regarding a specific cultural practice or racial stereotype, defendants face the formidable task of discrediting the generalization. How does one go about rebutting a stereotype? Defendants will always only have limited success during cross examination of witnesses presenting cultural evidence. Even if witnesses admit their testimonies are based on generalizations of an identifiable group as a whole, such admissions bolster the prosecution's case. These admissions allow prosecutors to reiterate that members of a group, with which a defendant is inherently associated, would typically act in conformity with the characterization. One of the central weaknesses of cultural evidence is that it cannot be empirically proven.[45] Witnesses providing cultural evidence typically do so by giving qualitative assessments.[46] However, what is a weakness in the eyes of defense attorneys is a strength in the minds of prosecutors because although cultural evidence cannot be proven true, it also cannot be proven wrong. With the limited prospect of discrediting cultural evidence, defendants may feel compelled to testify. In criminal cases, defendants are not required to testify under the Fifth Amendment's guarantee against self-incrimination.[47] Once a court accepts a racial generalization as the basis for a theoretical motive, leaving the assertion unchallenged will be damaging to a defendant. Without a realistic avenue of disproving prosecutorial

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44. U.S. CONST. amend. V ("no person . . . shall be compelled in any criminal case to be a witness against himself."); *see also* South Dakota v. Neville, 459 U.S. 553, 563 (1983) ("the Court has long recognized that the Fifth Amendment prevents the State from forcing the choice of this "cruel trilemma" on the defendant").

45. Since cultural evidence is difficult to verify empirically, one may wonder why prosecutorial use should be subject to more scrutiny than defendant use. When prosecutors use cultural evidence, they are not directly making a claim that the defendant fits a stereotype; they are trying to get jurors to infer it. When defendants use cultural evidence, it parallels the testimony of an individual attesting to their private thoughts. The tie between the cultural stereotype and the defendant is made directly by the defendant. It is no different than a defendant making an unverifiable statement about their thoughts or feelings. The jury can take it or reject it as they please based on the credibility of the defendant.

46. Qualitative statements include claims such as the following: Asians are submissive, blacks are athletic, etc. On the other hand, quantitative statements would be verifiable factual statements based on empirical research or statistics.

47. U.S. CONST. amend. V.

evidence based on mere stereotypes, defendants are forced to make a difficult decision. They must choose between leaving prosecutorial cultural evidence uncontested in front of the fact-finder or testifying that the stereotype does not truthfully depict the defendant's culture. The most effective way to combat a stereotype's effectiveness is for a defendant to testify how he does not fit within it. If the defendant decides to testify, he opens himself up to questioning regarding other matters outside the scope of cultural evidence. In effect, the non-existence of effective methods for refuting prosecutorial cultural evidence may compel the defendant to testify.

B. Propensity Evidence Rules

The allowance of cultural evidence essentially permits the trying of a defendant on the actions of others. The use of cultural evidence to associate a defendant with the behaviors of others parallels the use of propensity evidence in that both are offered to suggest the defendant acted in accordance with an established trait. The Federal Rules of Evidence states, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion" except when character itself is a "pertinent" issue.[48] This means courts generally disallow evidence of one's reputation that is introduced to prove the defendant acted in a particular way on a specific date.[49] For instance, if a man was known as the local bully, evidence that he had a reputation for being a bully would not be allowed as evidence to suggest that he assaulted someone on a particular date. Only when a defendant takes the

48. Fed. R. Evid. 404(a).

49. State courts have evidence codes similar to the rules for character evidence outlined in the Federal Rules of Evidence. *See, e.g.*, WIS. STAT. § 904.04(1) (2000) ("Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion"); CAL. EVID. CODE § 1101 (West 2004) ("(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."); MICH. COMP. LAWS § 404(a) (2004) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion"). *See also* FED. R. EVID. 404(a) advisory committee's note ("The criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.").

initiative to inject character into a trial may the state offer character evidence in rebuttal to prove conduct.[50]

The basis for these evidentiary restrictions is steeped "more in history and experience than in logic" but the "underlying justification" is to prevent the admission of relatively non-probative evidence that is heavy with prejudice.[51] There may be some value to evidence that suggests a defendant had a violent reputation, but the criminal justice system recognizes that rumors should not be used for the purpose of proving a specific act. Whether someone's reputation reveals if that person is more likely to have committed a crime is questionable. Courts value relevance because relevant evidence allows fact finders to resolve the factual discrepancies that parties disagree upon in trial.[52] Reputation evidence may be the result of nothing more than rumors and lies, so it does not provide a factual basis for proving that a defendant has committed a crime. Even if a defendant earned his reputation for traits such as violence or anger, the accuracy of proposed character evidence does not remove the great risk of prejudice to the defendant that occurs when prosecutors suggest that he acted in conformity with the characterization on a particular occasion. Such prejudice will always exist when reputation evidence is offered to prove that an individual committed a crime because a reputation for having a particular trait does not equate to having acted in accordance with that trait at all times.

Although the relevance of character evidence is questionable, the relevance of prosecutorial cultural evidence is even more dubious. Rather than involving an accused's reputation, it involves the reputation of an entire group. Theoretically, if a prosecutor was allowed to admit a defendant's reputation for violence, the evidence would reveal at best that the defendant was known by his community to have a violent nature. No matter how faulty reputation evidence is, it is an attempt to individually assess the defendant's character. On the other hand, prosecutorial cultural evidence is not an attempt to directly establish that the defendant has been known in a community to possess a particular trait. Instead, it is an effort to indirectly suggest that reputation evidence

50. FED. R. EVID. 404(a)(1,2); *see also* MCCORMICK ON EVIDENCE,(John W. Strong, ed., 5th ed. 1999) (unless the defendant gives evidence of his good character, the prosecution cannot put forth evidence of defendant's bad character).

51. FED. R. EVID. 404(a) advisory committee's note.

52. FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

for an ethnic group is valid and that the defendant's inherent membership in that group makes him possess a particular trait.

Most jurisdictions also have broad prohibitions against the prosecution's introduction of prior specific acts to suggest that the defendant has a propensity to commit crimes. Like reputation evidence, the introduction of prior acts cannot be used to contend that a defendant acted in conformity with those acts during the incident in question.[53] However, there is a major exception to this general rule. Evidence of prior bad acts may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[54] As long as counsel declares that the purpose of introducing evidence of prior acts is for a different reason than proposing that the defendant is guilty of acting in conformity with those acts, it may be admissible.[55]

Skillful attorneys can use this exception to introduce otherwise prohibited evidence.[56] Prosecutors can enlarge this loophole by inventing a valid reason for admitting evidence of prior acts. Since the list of admissible purposes in the Federal Rules is not exhaustive, prosecutors are only limited by their imaginations.[57] Once a jury hears evidence of prior bad acts, regardless of the justifications for its admission into evidence, the defendant's chances for an acquittal fall in the minds of jurors who associate past behavior with the likelihood of being guilty.

If courts applied evidentiary rules similar to the Federal Rules of Evidence to cultural evidence and treated it as character evidence, the defendant would have to begin an inquiry into his cultural background before the prosecution can delve into those matters. Applying FRE 404(a) appears to rule out use of cultural evidence by prosecutors. Alternatively, if evidence rules similar to FRE 404(b) applied and analogized the treatment of cultural evidence to the process for admitting prior acts, prosecutors could easily justify the admission of cultural evidence as an attempt to show

53. FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.").

54. *Id.*

55. *Id.*

56. Philip R. Maltin & Michael D. Schwartz, *Second Acts, The Expansive Reach of Evidence Code Section 1101(B) Provides a Basis for Effective Strategies Before and During Trial*, 27 L.A. LAW. 31, 32 (2004) ("The obvious impact of the evidence the section regulates should invite attorneys to use that section whenever possible. Inventive strategies using Section 1101(b) may lead to the introduction of otherwise prohibited evidence. Practitioners can utilize Section 1101(b) in ways that expand its reach and enhance its influence before and during trial.").

57. FED. R. EVID. 404(b).

motive. The distinction between using prior acts to prove propensity and using such evidence to show motive is slight. The difference between propensity and motive is that motive involves showing why an individual responded to a particular set of circumstances, whereas propensity is just a tendency to act in a particular way. Motive is a specific showing of what caused someone to act. Skilled attorneys would be able to blur the distinction to the point where most cultural evidence could be admitted to show motive, but used by the jury as propensity evidence.

The difficulty of treating prosecutorial use of cultural evidence under the guidelines of FRE 404(b) is that cultural evidence does not deal with the defendant's prior acts. If the proposed cultural evidence is not an accurate statement of an existing cultural practice, it cannot logically be treated under evidentiary rules for prior bad acts. Even if the proposed cultural evidence is a truthful account of a recognized cultural practice, admitting it into evidence under FRE 404(b) would be an error because prosecutors cannot directly tie the previous acts of others to the defendant.

Without heightened standards for admitting cultural evidence, defendants may be convicted on evidence detailing the actions of others. Cultural evidence is not an individualized showing of motive. Every member of a racial minority group is subject to having an established motive if cultural evidence is readily admissible. For Dale Chu, if the only reason the prosecutor thought he acted in accordance to his father's wishes was because of his Korean background, the use of cultural evidence would be nothing more than a masked use of propensity evidence. Cultural evidence is less probative than propensity evidence because Dale is being compared with stereotypical actions of other Koreans, not with actions of his own past. Thus, not only is cultural evidence highly prejudicial, it is ripe for manipulation by attorneys who seek to admit the evidence by masking it as an explanation for motive.

Although the strength of cultural evidence lies in the prosecution's suggestion to the jury that most people in the defendant's common cultural group act in the same manner, it only is relevant to the trial process if the jury assumes the defendant acts uniformly with the group. The Federal Rules of Evidence standards governing character evidence should apply to when and how cultural evidence should be allowed. Only when the defendant first introduces his character during trial should the prosecution be able to delve into anything resembling propensity evidence. If a defendant makes the decision to make his beliefs and daily practices an issue

during trial, he has not been coerced into taking the stand. Otherwise, cultural evidence can present a 5th Amendment self-incrimination problem even when offered for other reasons besides propensity.[58]

C. Effect on Jurors

Since witnesses relating cultural evidence only testify about the existence of group stereotypes, such testimony is only probative if jurors connect the supposed cultural behavior to defendants through group affiliation. Jurors cannot ignore cultural evidence because once a judge determines it is admissible, it automatically gains credibility. Blatant racial stereotypes that would raise eyebrows if uttered in most public forums become sociological theories when presented in court. Under the guise of reasoned deduction, cultural evidence repackages racial stereotypes and presents them as facts. Even enlightened jurors would have difficulty rejecting racial stereotypes when they are presented as factual evidence. Jurors have discretion to reject and accept the soundness of evidence presented, but courts expect that jurors give consideration to all admitted evidence.

Although the effects of cultural evidence are subtler than prosecutorial misconduct, it is subtlety that compounds the harmful nature of cultural evidence because it makes the racial stereotypes underlying cultural evidence difficult to recognize. When cultural evidence is presented in a manner that is meant to appeal to rational thought, its effects on the jury are twofold. First, it allows racially prejudiced jurors to exercise their biases without circumspection by the judge. When a judge allows the prosecutorial admission of cultural evidence, it signals to the jury that they are allowed to draw their own assumptions about racial and cultural stereotypes when weighing the evidence against the accused. Secondly, when prosecutors use cultural evidence it encourages the manifestation of hidden biases within jurors of which even the jurors are not cognizant.[59]

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58. *See infra* Part IV for when cultural evidence should be allowed and under what guidelines it should be admissible.

59. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach To Discrimination And Equal Employment Opportunity*, 47 STAN L. REV. 1161 (1995). Krieger argues that cognitive biases shape people's point of view and cause people to classify things. Krieger also notes that people may exaggerate differences based on perceived groupings

In his book *Negrophobia and Reasonable Racism*, Jody David Armour explains that there is a difference between prejudice and stereotypes.[60] Even when people are not prejudiced, ingrained stereotypes can cause conflict with how they know they should act.[61] Cultural evidence allows these stereotypes to come to the forefront without that conflict and in the absence of prejudice because jurors are following rational evidence the prosecutor presented. Rendering cultural evidence inadmissible cuts off an avenue for people, who do not want to be prejudiced, to express their hidden or conflicting biases.

Appeals to racial bias are effective in trial because people harbor hidden prejudices. A case that illustrates the effects of hidden prejudices on a criminal defendant is the New York case of *People v. Goetz*.[62] Bernhard Goetz was a white male who was carrying a concealed, unlicensed .38 caliber handgun on a subway train.[63] Two young black males approached him and said, "Give me five dollars."[64] He shot the two males and their two companions as they tried to get away from him even though none of them displayed any weapons.[65] When Goetz noticed one of the youths appeared uninjured, he walked up to the young man and said, " '[Y]ou seem to be all right, here's another,' " then fired his remaining bullet.[66] This last bullet caused paralysis by cutting through the black male's spinal cord.[67] Goetz admitted to police, " '[I]f I had had more [bullets], I would have shot them again, and again, and again.' "[68] The first grand jury to hear the case dismissed the count of attempted murder.[69] A second grand jury brought indictments for attempted

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without motivation; this means the first type of pretext may be especially hard for someone to prove discrimination because people may not know they have discriminatory biases existing in their brains. She proposes that cognitive mechanisms of all people distort information automatically without people being aware of its occurrence. *See also* Mark Snyder, et al., *Social Perception and Interpersonal Behavior: On the Self-Fulfilling Nature of Social Stereotypes*, 35 J. PERSONALITY & SOC. PSYCHOL. 656 (1977) (arguing that once an individual internalizes tacitly transmitted cultural stereotypes, he unconsciously interprets future experiences to be consistent with the underlying stereotype, selectively assimilating facts that validate the stereotype while disregarding those that do not).

60. JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM, 121–126 (1997).

61. *Id.*

62. People v. Goetz, 497 N.E.2d 41 (N.Y. 1986).

63. *Id.* at 43.

64. *Id.*

65. *Id.* Two of the black males had screwdrivers hidden in their coats to break into video game machine coin-boxes.

66. *Id.* at 44.

67. Subway Shooting Suspect Agrees to Return to N.Y., L.A. TIMES, Jan. 2, 1985, at A2.

68. *Goetz*, 497 N.E.2d at 44.

69. *Id.* at 44–45.

murder after the Supreme Court, Criminal Term, allowed the prosecution to resubmit the matter due to newly discovered evidence.[70] During trial, Bernard Goetz claimed self-defense and was acquitted of attempted murder charges. His self-defense claim was based on his contention that it was reasonable for a person in his situation to have acted in the same manner.

Legal observers have theorized over the role race played in the case and whether a grand jury sympathized with a white male who shot young black robbers on the subway.[71] Race was never an explicit issue during the *Goetz* trial. Defense counsel subtly manipulated juror prejudices in favor of his client. For instance, the defense recreated the incident in the courtroom to show how each victim was shot.[72]

> The nominal purpose of the demonstration was to show the way in which each bullet entered the body of each victim. The defense's real purpose, however, was to re-create for the jury, as dramatically as possible, the scene that Goetz encountered when four young black passengers began to surround him.

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70. *Id.* at 45.

71. *See* George P. Fletcher, A Crime of Self-Defense: Bernard Goetz and the Law on Trial, 206 (1988):

> These verbal attacks signaled a perception of the four youths as representing something more than four individuals committing an act of aggression against a defendant. That "something more" requires extrapolation from their characteristics to the class of individuals for which they stand. There is no doubt that one of the characteristics that figures in this implicit extrapolation is their blackness.

See also Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 425–426 (1988):

> The public knew the skin colors of everyone involved. If one knows in advance that black people tend to be transgressors and white people tend to be victims, it is fairly simple to sort out who's who once the participants are identified by race. The short of it is that the story of the subway car as perceived by Mr. Goetz's public—the choice of transgressor, the choice of victim—might have been starkly different had Mr. Goetz been black and the others white, and had Mr. Goetz cried "self-defense" while the others insisted that when he pulled the gun, they had been minding their own business. For in that event, a public with no real knowledge of the facts other than the stories told by the participants and the skin colors of the shooter and his victims would not have raced at once to Mr. Goetz's defense. But his victims happened to be black, and the rush was on.

See also Bob Greene, *N.Y. Subway Attack Speaks for Nation*, CHI. TRIB., Jan. 8, 1985, sec. 5, at 1 ("New York's police set up a telephone hotline so that citizens could provide tips about the shooter's identity; instead, the phone line was flooded with citizens praising [Goetz], even saying that he should run for mayor.").

72. Fletcher, *supra* note 71, at 207.

> For that reason [Goetz's attorney] asked the Guardian Angels to send him four young black men to act as the props in the demonstration. In came the four young black Guardian Angels, fit and muscular, dressed in T-shirts, to play the parts of the four victims in a courtroom mini-drama.[73]

Whatever inferences the jury drew from the racial identities of the defendant and victims were the result of the jurors' personal stereotypes of young black male robbers and white targets of robbery. At the end of the trial, jurors were free to use their racial prejudices in determining whether Goetz as a white male acted justifiably to protect himself when approached by black males for $5.

People v. Goetz is an instructive case that illuminates not only how juror prejudices can still affect the trial process in the absence of blatant appeals to race bias, but also what the role of a trial judge should be in limiting the possible effects of racial prejudice from interfering with judicial proceedings. When the jurors in *Goetz* were asked whether Goetz's actions were consistent with those of a reasonable man in his situation, they were allowed to consider the race of the defendant and those who had surrounded him on the subway. Courts have the duty of defining the reasonableness standard in a reasonable man test.[74] Mere observation of what constitutes popular thought and calling that reasonable is not enough.[75] In everyday life, people make judgments about individuals based on group affiliation. Business organizations such as insurance companies assign risk to individuals based on group risk assessments, and lenders act the same way with respect to giving loans.[76] Making assumptions of individuals based on their membership to particular groups is commonly used in everyday life because it is cheaper and quicker than individualized consideration. However, relative cost comparisons should not be the determining factor in deciding whether to invest in making an individualized

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73. *Id.* For other cases where attorneys use subtle references to race to bolster their cases, *see generally* Brent v. White, 398 F.2d 503, 505 (5th Cir. 1968) (upholding rape conviction by finding prosecutor's description of rape victims as "'white girls' revealed nothing that jury could not itself observe when both victims testified"); Simpson v. Jones, 238 F.3d 399 (6th Cir. 2000) (finding no improper conduct when prosecutor referred to defendant as "dark skinned one" to distinguish defendant from the other two defendants); Russell v. Collins, 944 F.2d 202, 204 n.1 (5th Cir. 1991) (finding prosecutor's argument asking jury to imagine fear of white victim when held captive by three black strangers an isolated reference to the identity of the parties and not improper conduct).

74. ARMOUR, *supra* note 60, at 33.

75. *Id.*

76. *Id.* at 46.

consideration. In some situations, the apportionment of risk outweighs the cost-effective approach of using generalizations. In the area of criminal prosecutions, the risk of misapplying a stereotype to a criminal defendant is too significant. In deciding whether a criminal case requires individualized consideration, the use of generalizations is only efficient because the decision maker is not at risk to bear the costs the criminal defendant faces if a generalization is misapplied.[77] The cost of not using individualized consideration is high if the generalization is wrong; even if the generalization seems logical, it may not be reasonable when balancing the potential costs to a defendant.[78] Without individualized consideration, a criminal defendant is denied due process of law because the specifics of his case are ignored.[79]

Although a trial infected by racial prejudice violates due process by influencing the jury both in instances of racial stereotyping by jurors and prosecutorial use of cultural evidence, use of cultural evidence is a violation that courts are better equipped to handle. Unless prosecutors make overt appeals to racial bias, prejudiced juror action is difficult to police. If states do not create the racial characterizations that jurors apply to defendants, it will be difficult for courts to even know racial bias was a significant factor in the juror's decision.[80] This rings particularly true when observations of the races of the defendant and victim by jurors are the only impetus for racial prejudice to factor into their decisions of guilt or innocence. Jury deliberations are not readily open to scrutiny. When jurors use racial biases on their own impetus to pervade their decision-making process, states are often passive actors that

77. *Id.*

78. *Id.* at 47–48.

79. *See id.* at 71 (Armour suggests that the 14th Amendment's guarantee of equal protection may be infringed if states use race categories to try defendants differently. For instance, a black male's trial experience will be different from that of a white male solely because he is of a different race.).

80. *See* U.S. v. Santiago, 46 F.3d 885 (9th Cir. 1995) (holding that references to ethnic identity in prison murder case did not violate defendant's right to equal protection and that using name of prison gang and relevant testimony referring to ethnic background of certain prisoners was not an appeal to race bias); U.S. v. Kirvan, 997 F.2d 963 (1st Cir. 1993) (closing argument that jury should consider whether defendant met eyewitness description of perpetrator as being Portuguese not an impermissible racial slur. Even if "Portuguese" served a dual role the court would have found it not an impermissible racial slur because the courts err on the side of harmless error.); Brent v. White, 276 F. Supp. 386 (E.D. La. 1967) (prosecutor's reference to victim of alleged rape as "a white girl" in trial of black defendant not inflammatory even though jury was all white because when the victim took the stand it was obvious she was "a white girl"); U.S. v. Perez, 144 F.3d 204 (2d Cir. 1998) (prosecution's referral to conversation in Spanish between government agent and defendants as "[t]hey do a Spanish thing" was just a reference to the fact that the conversation was in Spanish.).

cannot prevent jurors from exercising those prejudices. However, in the instances of prosecutorial presentation of cultural evidence, states are actively placing defendants into a category without verifying if defendants actually fit within the group.[81] When prosecutors present cultural evidence, states are actively encouraging juries to make incorrect assumptions of criminally accused. Overt actions by prosecutors are easier to manage than covert thinking processes of jurors. Presentation of cultural evidence is a step that precedes juror determination of guilt. Courts can limit the influence of juror biases by preventing the admission of cultural evidence, or limiting its use.

D. Standards for Reviewing Prejudicial Effects of Cultural Evidence on Jurors

To determine what standard would apply upon appellate review of a conviction tainted by prosecutorial use of cultural evidence, the admission of cultural evidence first must be classified. There are separate standards of review for constitutional errors and non-constitutional errors. If cultural evidence is classified as a constitutional error, the *Chapman* test would apply.[82] When reviewing constitutional errors that infect the trial process, appellate courts usually apply the *Chapman* standard.[83] In *Chapman*, the petitioners were a couple who had been found guilty of robbery, kidnapping and murder.[84] Both defendants chose not to testify during their trial and the prosecutor commented during closing arguments that their silence was indicative of their guilt.[85] Before the California Supreme Court heard the defendants' appeal, the United States Supreme Court held in *Griffin v. California* that allowing the state to comment on a defendant's exercise of silence during trial was tantamount to putting a "penalty on the exercise of a person's right not to be compelled to be a witness against himself, guaranteed by the Fifth Amendment to the United States Constitution and made applicable to California and the other States by the

81. There may be conflicting stereotypes that exist for the same ethnic categories. For example, an Asian defendant may either be presented as an individual who fits the profile of a studious, docile Asian. On the other hand, the defendant could be shown to be a socially deviant Asian gangster.

82. Chapman v. California, 386 U.S. 18 (1967).

83. *Id.*

84. *Id.*

85. *Id.*

Fourteenth Amendment."[86] When the Chapman defendants' appeal reached the California Supreme Court, the court admitted that the defendants were denied their federal constitutional right to remain silent.[87] However, the court affirmed the convictions under the California state constitution's harmless error clause because the errors did not result in a miscarriage of justice.[88]

When the Chapman defendants appealed to the United States Supreme Court, the Court granted certiorari to decide two issues. "Where there is a violation of the rule of *Griffin v. California*, . . . (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?"[89] The Court held "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt".[90] In a subsequent case, the Supreme Court applied the *Chapman* standard to mean whether a rational jury would have found a defendant guilty without the inadmissible evidence.[91]

The *Chapman* test does not apply to all constitutional errors. It does not apply to constitutional errors requiring the remedy of barring re-prosecution.[92] For a few select constitutional violations of due process, reversals require a showing of likelihood of prejudice.[93] In those cases, the showing of likely prejudice precludes the need to apply *Chapman*. "Structural defects" also do not require the use of the *Chapman* test. Although there is no rule that all federal constitutional errors require reversal,[94] courts typically grant automatic reversals for "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards."[95]

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86. *Id.* at 19 (citing Griffin v. California, 380 U.S. 609 (1965)).

87. *Id.* at 20.

88. *Id.*

89. *Id.*

90. *Id.* at 24.

91. Neder v. United States, 527 U.S. 1, 15 (1999) (citation omitted) ("In *Chapman v. California*, we set forth the test for determining whether a constitutional error is harmless. That test, we said, is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' ").

92. Examples include violations of the guarantees of a speedy trial and protection from double jeopardy.

93. *E.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (non-disclosure by prosecutor of possibly exculpatory evidence only warrants reversal when evidence would have effect on outcome); Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring that defendants claiming ineffective assistance of counsel also show that deficiency prejudiced defendant).

94. *Chapman*, 386 U.S. at 21.

95. Arizona v. Fulminate, 499 U.S. 279, 309 (1991). This case involved great debate over what differentiates a trial error from a structural error. Although the justices could not agree on how to classify involuntary confessions, which were at issue in the case, they generally agreed on a definition of structural error.

"Structural defects" are those that affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself".[96] Examples of structural defects include excluding members of particular races from a grand jury and the denial of the right of self-representation.[97]

If the admission of prosecutorial use of cultural evidence is not considered a constitutional error, a different type of review would apply. Different jurisdictions may have their own separate rules for appellate review so this Note will focus on the federal standard. Since many state laws and judicial procedures are patterned after federal rules, focusing on the federal standard of review allows for a general study of the judicial rules across all states. For a federal court to reverse a non-constitutional error, an appellant must prove the loss of a substantial right affected the fairness of the trial as a whole, by calling into question the reliability of the result.[98] The federal harmless error standard precludes prophylactic reversals that dismiss the need for an outcome-impact test, which is often referred to as a "harmless error test".[99] The outcome-impact test is often misunderstood. The standard is not whether a guilty verdict is correct in light of all admissible evidence.[100] The correct understanding of the outcome-impact test is whether an appellate court can say the fact finder's decision was not substantially swayed by error.[101] The key determinant in the outcome-impact test is the probability of an error substantially swaying the jury. Convictions are reversed when an appellate court determines the jury was substantially swayed by error, despite the existence of any remaining evidence sufficient to support a conviction. However, the burden of proof to show harmless error does not always rest on one side.[102] The assignment of the burden of proof on a party may not matter because after a party suggests prejudice occurred, appellate courts look at the record and assess on their own if prejudice occurred.[103] State appellate courts widely employ a harmless error test in their

96. *Id.* at 310.

97. *Id. See also* Rose v. Mitchell, 443 U.S. 545 (1979) (exclusion of grand jurors on the basis of race is automatically harmful because it undermines confidence in the judicial system).

98. "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." FED. R. CRIM. P. 52(a).

99. Bank of Nova Scotia v. U.S., 487 U.S. 250 (1988).

100. Kotteakos v. U.S., 328 U.S. 750, 776 (1946) ("That conviction would, or might probably, have resulted in properly conducted trial is not the criterion of § 269.").

101. *Id.* at 765.

102. *Id.*

103. *See* O'Neal v. McAninch, 513 U.S. 432 (1995).

own jurisdictions.[104] Therefore the impact of this test is felt far beyond the federal courts.

Similar to how appellate courts reserve automatic reversal for structural defects that violate constitutional rights, courts treat non-constitutional structural errors that infringe on substantive rights with greater scrutiny than non-structural errors. In instances of non-constitutional structural errors, the outcome-impact analysis does not apply because it is difficult to pinpoint the error's effect on the decision-making process. Additionally, such rights implicated in structural errors affect values aside from the reliability of a trial's outcome.[105]

Prosecutorial use of cultural evidence should be considered a structural constitutional error under *Chapman* or, alternatively, as a structural non-constitutional error that avoids the outcome-impact test. The effects of prosecutorial cultural evidence and structural errors on the judicial process are similar. Both infect the trial process itself by openly allowing racial prejudice to enter the jury's decision making process. Additionally, the effects of cultural evidence are pervasive throughout the entire trial process and are difficult to isolate. When courts allow the admission of cultural evidence by prosecutors, the courts endorse the evidence as sound to the extent that it can be considered during jury deliberations. The prejudicial impact of cultural evidence on defendants goes beyond racially inflammatory statements uttered by prosecutors during closing arguments. Cultural evidence is presented to the jury as sociological fact based on observations that are supposedly free of bias. The allowance of cultural evidence taints the trial process and undermines the public's faith in whether individuals can receive a fair trial. Regardless of whether prosecutorial use of cultural evidence is considered a constitutional violation, appellants would benefit from the rule that reserves automatic reversals for such structural errors.

Alternatively, if the admission of cultural evidence by prosecutors is not deemed a structural error, there are two scenarios to consider when choosing which standard of appellate review federal courts should apply. First, if admission of the evidence is determined only to be a constitutional error, then applying the *Chapman* standard would still result in the reversal of a conviction. Courts

104. *See* People v. Watson, 299 P.2d 243 (Cal. 1956).

105. For instance, unless structural errors are reversed, public faith in the judicial process may diminish. The end result would be a judiciary that lacks legitimacy in the eyes of the citizenry.

could not say that the admission of cultural evidence did not harm the defendant beyond a reasonable doubt, so the trial court decisions would fail the *Chapman* test. When, as in the *Chu* case, cultural evidence is offered to satisfy one of the material elements of a crime, courts cannot declare that the defendant would have been found guilty anyway because the state has not proven one of the elements of the crime. The other scenario of possible review would occur when an appellate court decides that the prosecutorial use of cultural evidence is a trial error but not one of constitutional magnitude. In that case, the *Kotteakos* outcome-impact standard would apply. Application of the *Kotteakos* standard should also result in a reversal because use of cultural evidence to satisfy one of the material elements, such as motive, should mean that its use significantly affected the fact finder's decision. If a prosecutor improperly relies on cultural evidence to demonstrate that a defendant has fulfilled a material element, the resultant conviction should be overturned.

PART IV—WHEN PROSECUTORIAL USE OF CULTURAL EVIDENCE SHOULD BE ADMISSIBLE

There are a few times when cultural evidence can be useful and pose no constitutional problems. In the ideal situation, the state would directly link the cultural practice to the defendant by showing how the defendant has personally adopted the practice. If direct linkage is not possible, then the combination of establishing a supportable theory as to why the defendant fits within a stereotype coupled with showing the supposed cultural trait to be a central aspect of the stereotype may suffice. However, the more prosecutors can directly link cultural evidence to defendants, the more probative and less prejudicial the evidence becomes.[106]

A. Directly Link Defendants to Cultural Evidence

Cultural evidence can be helpful in establishing a defendant's identity, motive, or common plan if the prosecution can directly connect the defendant to the belief system that underlies the

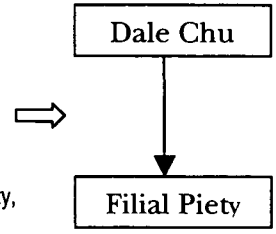
106. *See supra* note 7.

cultural practice. Cultural evidence should only be admitted if the stereotypes are demonstrated to individually apply to the defendant. The closer the prosecution relates the belief system to the defendant, the more probative the evidence becomes. For instance, assume the defendant in an assault case was part of a culture that valued the beauty of male facial hair. If a witness testifies that the assailant was a bearded man, the prosecution should not be allowed to introduce testimony that the defendant would have had a beard at the time of the assault because his culture holds facial hair in high esteem. Unless the prosecution is able to show the defendant maintains the practices and values of his culture, cultural evidence regarding facial hair is not probative. Obviously then, if the prosecution can show that the man indeed follows such practices, the evidence would be probative and could be appropriately considered. Establishing foundational facts regarding possible cultural beliefs such as how long the defendant has resided in the United States and whether the defendant has adopted other common cultural practices would assist fact finders in determining whether the accused grew facial hair. Without an inquiry into the defendant's cultural beliefs and practices, presenting cultural evidence is an attempt to admit propensity evidence.

In order to lay the foundation for the presentation of cultural evidence by establishing the nature of a defendant's cultural beliefs and practices, courts must develop proper guidelines. Prosecutors must directly link a defendant to cultural evidence. Establishing that a defendant is a member of a particular cultural group does little more than confirm what jurors already know by observation. Unless a defendant is from an ethnic background that differs from what his appearance suggests, jurors can see for themselves that the defendant is black, Asian, or Latino. In order for the probative nature of cultural evidence to outweigh its prejudicial effect, prosecutors must connect the defendant to the type of belief and practice in question. For instance, in the *Chu* case the prosecutor should have been required to show that Dale Chu subscribed to an alleged aspect of Korean culture that put an extraordinary emphasis on family loyalty and filial piety. This showing could be met through accepted methods of introducing character evidence such as reputation testimony and evidence of previous acts that are indicative of the specific trait at issue.

FIGURE 1

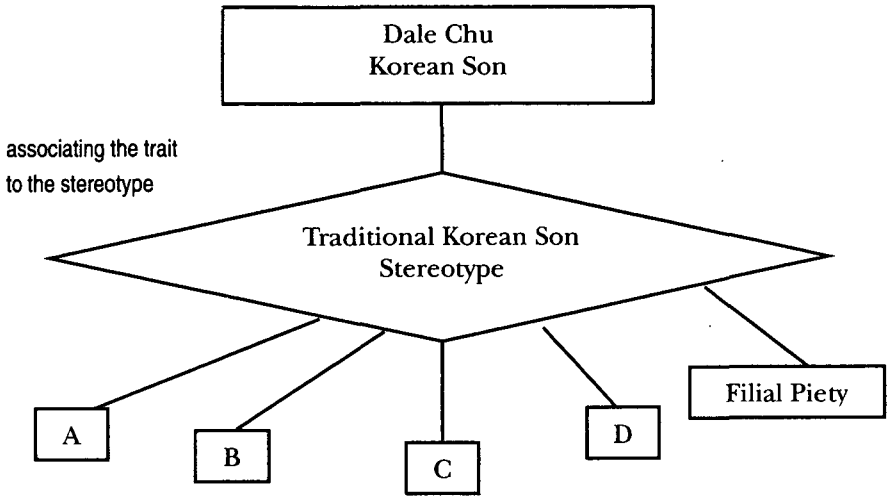
If a prosecutor can show filial piety to be one of Chu's traits, the prosecutor can use Chu's Korean background to explain the reason for Chu's piety. The arrow is unidirectional because it reflects how Chu's Korean background can be used to describe an independently established connection to filial piety, but cannot be used as a basis for connecting filial piety to him.



By directly showing how Dale Chu typically respected his father's wishes, the prosecutor could have avoided the need for cultural evidence altogether. Introducing evidence that revealed how Dale Chu ordinarily listened to his parents would have been more probative than unsupported generalizations regarding a culture's high valuation of parental obedience. If a prosecutor still wanted to use cultural evidence, doing so would not present due process problems in this instance. Once Dale Chu's obedient nature was established in court, the prosecutor could have used his Korean background to explain the underlying reasons for his submissive role as a son. Observe that this situation is different from what occurred in *Chu.* Instead of using Chu's Korean background to extrapolate that Chu was constricted by cultural norms to obey his father, his ethnic background would be used to explain the origins of one of his traits that the prosecutor has already established during trial. Additionally, it is important to note that in this case, the establishment of Chu's submissive trait would be done independently of racial stereotypes. The mention of Korean cultural values would only arise once the prosecutor had established Chu's filial piety.

Instead of trying to directly prove Dale Chu was a submissive son, the prosecutor attempted to show jurors that Korean sons are obedient to their parents and thus Dale Chu was as well. In Figure 2, the chart diagrams five aspects of the stereotype of a traditional Korean son.

FIGURE 2



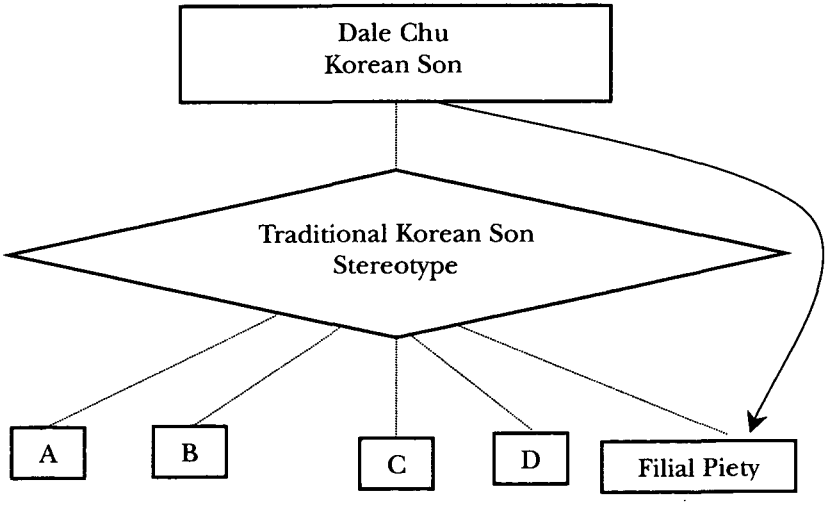
The four lettered boxes represent hypothetical characteristics, while the fifth box represents the filial piety trait that prosecutors used in *Chu*. The combination of the five traits forms the stereotype of a traditional Korean son. In order for the prosecutor in *Chu* to introduce cultural evidence in a manner inoffensive to due process, the prosecutor would have demonstrated why Dale Chu fits the stereotype and how filial piety is a major component of a traditional Korean son's role.[107] Thus, by establishing a solid link between Dale Chu and the stereotype, and then from the stereotype to filial piety, the prosecutor would have minimized the chance of racial prejudice and bias corrupting the trial. Although this method does not directly associate Dale Chu to filial piety to the degree that the method illustrated in Figure 1 accomplishes, it does attempt to directly tie Chu to the prosecution's offered reasoning for motive.

In actuality, the state argued that Dale Chu, by virtue of having a Korean father, fit within the stereotype of traditional Korean son, which is represented in the figure by the diamond. Consequently, the prosecutor argued that the trait of filial piety, one of the five characteristics of the traditional Korean son stereotype in Figure 2,

107. Hypothetically, if a prosecutor can prove that an individual fits within a stereotype, then cultural evidence may be permissible. However, in reality, proving that an individual fits a stereotype may be difficult. The easiest method would be to have the defendant testify as to his belief system and whether he does practice the cultural trait underlying the cultural evidence. Another possible method could be to establish that the defendant was a recent immigrant who still lived according to the societal rules of his homeland.

applied to Dale Chu. The problem with the prosecutor's use of cultural evidence was that there was no basis for connecting Dale to the traditional Korean son stereotype except his Korean ethnicity. As a result, the prosecutor asked jurors to make two inferences. First, the jurors must infer that since Dale is Korean, he automatically fits within the traditional Korean son stereotype. That is not to imply that the jurors see all Koreans stereotypically. If the jurors believed the prosecutor's claim that Dale was motivated by his cultural background to commit arson and insurance fraud, in the absence of any evidence to support why Dale Chu fit the stereotype of a traditional Korean son, one must assume that the jurors believed that Chu fit the stereotype only on the basis of his Korean background. Once the jurors make the first inference, they must make the second inference that a person who fits the traditional Korean son stereotype exhibits all the purported traits of the stereotype. Unless the prosecutor shows that unquestionable obedience to parental commands is an inherent characteristic of the Korean son stereotype, suggesting Dale Chu fits the stereotype does not help establish motive. Since the prosecutor in *Chu* did not explore the nature of the Korean culture's emphasis on children's respect and obedience towards parents, the jurors had to infer that Korean culture dictated that children obey their parents. Instead of the appropriate measures necessary reflected in Figure 2, the prosecutor substituted established links for juror inferences, as shown below in Figure 3.

FIGURE 3



The once solid lines between the rows of boxes are now dashed to indicate that the prosecution has not established the evidentiary foundation to link the boxes together. The dark curved line connecting Dale Chu to filial piety illustrates how the prosecutor used cultural evidence to propose motive without connecting the defendant to the stereotype and without connecting the stereotype to the trait of filial piety. By merely relying on the fact that Dale Chu is Korean, the prosecutor forced the jurors to make two levels of propensity inferences. The first level is that he fits the traditional Korean son stereotype. The second level is that people fitting that stereotype endure a sense of filial obligation that can exceed the scope of lawful conduct.

If the prosecutor can directly show Dale Chu had a heightened sense of filial duty and family loyalty, the cultural evidence can be directly connected to the defendant. In such a case, the prosecutor can proceed to introduce the traditional Korean son stereotype to explain the underlying reasons of Chu's filial piety. In other words, the use of the stereotype would not seek to establish the existence of an associated trait. Instead, the stereotype would be offered to further explain the specific characteristics of a trait which prosecutors have already shown the defendant to possess. Connecting Dale Chu to the stereotype does not directly connect him to the notion of filial piety. By merely showing that Dale Chu fits the stereotype, the prosecutor would be forcing the jurors to make two levels of propensity inferences. The first level is that he fits the traditional Korean son stereotype. The second level is that people fitting that stereotype endure a sense of filial obligation that exceeds the scope of lawful conduct.

Judges must be cautious of prosecutorial attempts to connect a defendant to a general stereotype. The prosecutor in the *Chu* case argued that Dale Chu obeyed his father's command to commit arson because Korean sons were obligated to follow their parents' wishes. If the prosecutor had structured his argument more generally and contended that Dale Chu's responsibility to uphold an extraordinary level of filial piety was only one of his duties as a traditional Korean son, character evidence that Dale Chu was known to act in ways that fulfilled other aspects of a traditional Korean son stereotype would not be sufficient to connect Dale Chu to the crime. For instance, another aspect of the traditional Korean child stereotype is that children must study diligently to achieve academic success. If the prosecutor was able to provide incontrovertible character evidence regarding Dale Chu's obsessive drive to maintain

impressive grades, he may have linked Dale Chu to one aspect of the traditional Korean son stereotype but that link does not connect Dale Chu to filial piety. Assume Box A in Figure 2 represents the trait of an overzealous child seeking to please his parents by meeting their expectations of excellent grades. Now the prosecutor is asking jurors to make the third level of inference that a Korean student who makes a tremendous effort to academically succeed fits the mold of a traditional Korean child. Cultural evidence is most probative when connected directly to the trait at issue and not the general stereotype of the defendant's alleged associated group.[108]

In the *Chu* case, the court allowed the prosecutor to present evidence through the testimony of a Joanne Weiss, a matronly figure who owned a house where Dale Chu lived in the summer of 1999, to state how a Korean son such as Dale Chu could not disobey his parents' wishes.[109] Such testimony does not warrant the inference all the way to filial duty. Moreover, such statements by an individual who has not been qualified as an expert in Korean culture should not have been admissible. The court should have permitted the prosecutor to only present cultural evidence that directly related to Dale's relationship with his father.[110] Any conclusory personal opinions by the witness should have been considered irrelevant.

B. Cultural Evidence Based on Religious Beliefs

A particular subset of cultural evidence constitutes a narrow exception where proof of group affiliation may be sufficient to permit the admission of cultural evidence in criminal cases.

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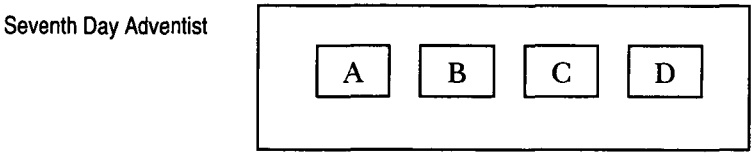
108. *See* Malley v. Connecticut, 414 F. Supp. 1115 (D. Conn. 1976) (Prosecutor's remarks during trial for sale and possession of LSD reflected attempt to inflame prejudices of jury. The introduction of "drug culture" and implying, without evidentiary support, that defendant was connected to it, violated right to a fair trial in violation of due process clause.).

109. Wisconsin v. Chu, 643 N.W.2d 878, 883 ("I know that Dale would have to get something out of it, but his dad is the one that should be sitting in that chair. In my eyes, his dad is the one that is responsible. Dale was a 16-year old kid and in his culture and in Dale's beliefs, you just don't talk back to your parents, you don't—you do what your parents ask you to do.").

110. *Chu*, 643 N.W.2d at 884. Part of Weiss's testimony dealt with statements Dale told her about his relationship with his father and her personal observations of Dale's demeanor towards this father. Such testimony is a valid presentation of cultural evidence but is cultural evidence even necessary if the prosecutor can already prove the nature of Dale's relationship with his father?

Cultural evidence that relates to religion warrants special consideration by courts. Religion can be defined as a system of beliefs and practices.[111] Since all the members of a religious group are united in a common set of beliefs, once a prosecutor exhibits that a defendant is a member of a particular religion, cultural evidence is probative.

FIGURE 4



In Figure 4, the outer box represents the beliefs of Seventh Day Adventists. The lettered individual boxes represent an official belief or practice of that religion. All people who identify themselves as Seventh Day Adventists subscribe to the set of beliefs symbolized by the entire area within the outer rectangle. Consequently, every Seventh Day Adventist is represented by the outer rectangle. If able to establish that a defendant is a Seventh Day Adventist, a prosecutor could introduce relevant evidence regarding any of the official religious values or routines of the Seventh Day Adventist Church without giving rise to most of the problems inherently associated with cultural evidence.

Religions that are an aspect of one's ethnic culture pose a unique problem.[112] For instance, all Jews are born with a Jewish ethnic background, but all Jews may not be practicing members of their faith. When ethnicity and religious beliefs converge, courts must be cautious in deciding whether proposed testimony directly relates to the defendant.[113] If the religion in question implicates

111. OXFORD AMERICAN DICTIONARY, 764 (1980): (defining religion as "1. belief in the existence of a superhuman controlling power, especially of God or gods, usually expressed in worship. 2. a particular system of faith and worship, *the Christian religion*. 3. something compared to religious faith as a controlling influence on a person's life.").

112. *See* Bains v. Cambra, 204 F.3d 964 (9th Cir. 2000) (allowing the introduction of religious beliefs in murder trial of unfaithful Sikh husband to establish possible motive but holding prosecutor's summation as exceeding scope of allowable cultural evidence).

113. *Id.* at 974:

ethnicity, the extent of a defendant's religious belief must be established if the prosecutor wants to propose a religious motive for a crime. Otherwise, if a prosecutor is staking a claim based on cultural practices as dictated by ethnic customs, the same procedure for admitting other types of cultural evidence should apply. The critical factor in whether cultural evidence should be allowed is the degree to which it can be directly linked to the defendant. Group membership is not enough. There must be independent criteria that indicate the defendant fits within the stereotype the prosecutor is offering for non-propensity purposes.

PART V—CONCLUSION

Cultural evidence must be held to a higher standard of review than the current standards require. Controlling its use in courtrooms is an easy task and can be done with little cost. Improper use of cultural evidence should be considered a structural error requiring automatic reversal on appeal. The use of cultural evidence differs from prosecutorial misconduct and improper arguments by prosecutors because it allows jurors to exercise biases openly on the justification of reasoned analysis of trial evidence. Although some use of cultural evidence is allowable in narrow circumstances, its use can be avoided altogether by a direct showing that a defendant possessed the particular type of belief or habit. The Fifth Amendment guarantees citizens the right to due process of law. Unrestrained use of cultural evidence threatens that right and must be limited whenever possible to ensure equal access to justice.

The Fifth Amendment guarantees criminal defendants the due process of law in federal proceedings, while the Fourteenth Amendment protects their right to due process in state

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It is not inconceivable that the prosecutor's discriminatory remarks against Sikh persons actually were a form of religious rather than racial or ethnic discrimination. After all, the technical definition of Sikhism is that it is an offshoot of the Hindu religion. Given the correlation between being a Sikh and being racially and ethnically Indian and the prosecutor's comparison of being an American and being a Sikh, the classification also seems to have racial and ethnic components. Moreover, although perhaps to a lesser extent, religion-based prosecutorial arguments also are prohibited under clearly established federal law.

proceedings.[114] One of the pillars of the American justice system is the right to a fair trial free from racial prejudice. Courts review improper prosecutorial statements under a harmless error standard.[115] The exact standards of review vary between jurisdictions but all are based on a showing of prejudice. While cultural evidence should generally not be admitted, if it is admitted and considered, courts should hold such evidence to a stricter standard than harmless error because it is more difficult to estimate its effect on jurors.

114. Malloy v. Hogan, 378 U.S. 1, 3 (1964) (holding that the "Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination").

115. *See* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (although prosecutor's comments were improper, it does not matter unless the comments infected trial with such unfairness to result in a denial of due process.)